

Honorable Judge Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

CLYDE RAY SPENCER ,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

NO. C11-5424 BHS

DEFENDANTS' JOINT
MOTIONS IN LIMINE

**NOTE ON MOTION CALENDAR:
Friday, December 20, 2013**

I. RELIEF REQUESTED

Defendants Davidson and Krause hereby jointly move the Court for an Order in Limine, precluding any evidence or testimony, opinions, comments, argument, statements or questions by counsel, by any witnesses, or by the parties, directly or indirectly or by inference, on the topics or items of evidence set forth below. This motion is made pursuant to *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986), Fed. R. Evid. (FRE) 103(d), and FRE 104.

Defendants further jointly move that the requested Order contain a direction to plaintiff's counsel to inform all witnesses called by plaintiff of the prohibition against testimony on these subjects, and that the requested Order recognize that throughout the trial defendants have a standing objection to evidence, argument, and other matters as to which defendants' motions in limine are denied. *See* FRE 103(b).

II. LAW AND ARGUMENT

A. Summary of Remaining Claims

This Court previously granted in large part defendants' summary judgment motions and dismissed many of plaintiff's claims. *See, e.g.*, Dkt. 91, 93, 97, 98, 174, 179, 180, 182, 186, and 187. The only remaining plaintiff is Ray Spencer, and the only remaining defendants are Mike Davidson and Sharon Krause. *See id.*

The only remaining claims against defendant Krause are: (1) whether she knew Spencer was innocent, yet deliberately fabricated evidence by deliberately misquoting some or all of the three children's statements that Spencer sexually abused them; (2) whether probable cause to arrest Mr. Spencer was lacking to the extent probable cause was based on this allegedly fabricated evidence; (3) whether Krause conspired with Davidson to deliberately fabricate evidence knowing Spencer was innocent; and (4) whether her alleged deliberate fabrication of evidence proximately caused Spencer's injuries arising from his imprisonment following his *Alford* plea of guilty. Dkt. 180, pp. 23, 26-27, 30-31, 39. *See also* Dkt. 186, pp. 6-7 (dismissing on reconsideration claims for alleged *Brady* violations); Dkt. 187, pp. 14-15 (same).

The only remaining claims against defendant Davidson are: (1) whether he knew Spencer was innocent and knew of, or participated in Krause's alleged deliberate misquoting of the three children's statements; (2) whether probable cause to arrest Spencer was lacking to the extent probable cause was based on this allegedly fabricated evidence; (3) whether Davidson conspired with Krause to deliberately fabricate evidence knowing Spencer was innocent; and (4) whether Davidson set in motion a series of acts by Krause which he knew would proximately cause her to violate Spencer's right to be free from deliberate fabrication of evidence. Dkt. 187, pp. 8, 12-14, 18-19.

1 If Spencer is unable to prove the children's statements were deliberately fabricated by
 2 Krause or Davidson, then, as this Court previously ruled, there was probable cause to arrest and
 3 prosecute Spencer. Dkt. 174, pp. 21-23, 25, 28, 36. *See also* Dkt. 180, p. 31 (denying Krause's
 4 renewed summary judgment motion based on probable cause solely "[b]ecause there are genuine
 5 issues of fact regarding whether Krause fabricated evidence in the child victims statements ...");
 6 Dkt. 187, p. 13 (same regarding Davidson). Probable cause is a complete defense to Spencer's
 7 remaining claims. Dkt. 180, p. 31 (citing *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054-55
 8 (9th Cir. 2009); Dkt. 187, p.13 (same).

10 Evidence or argument presented to the jury must be relevant to these remaining liability
 11 theories. To be relevant, evidence must be probative and material to the issues the jury is to
 12 determine. FRE 401. Evidence irrelevant to these claims should be excluded. FRE 402.

13 **B. Defendants' Motions in Limine Regarding the Remaining Claims**

14 **1. Evidence or argument regarding claims dismissed and issues resolved in** 15 **defendants' favor by Orders entered on defendants' summary judgment** 16 **motions should be excluded.**

17 Plaintiff, his witnesses and counsel should be prohibited from mentioning or eliciting any
 18 testimony in support of claims that were previously dismissed by the Court. Such "evidence" is
 19 irrelevant under FRE 401 to plaintiff's remaining claims and would tend to confuse or mislead
 20 the jury as to the scope of potential liability in contravention of FRE 403. Specifically, the
 21 Court has previously made rulings and entered orders on the following five issues, so any
 22 evidence or argument on these five issues should be excluded:
 23

24 **a. Alleged failure to disclose evidence**

25 Plaintiff indicates in his pretrial statement that he intends to offer evidence of medical
 26 reports of examinations of Kathryn Spencer and Matt Hansen (plaintiff's proposed Exhibits 13

1 and 45), and a DVD video of James Peters' interview of Kathryn (plaintiff's proposed Exhibit
 2 30). Orders have been entered barring relitigation of all claims of unconstitutional conduct
 3 based upon alleged failures to disclose evidence in compliance with *Brady*, including the
 4 medical report of the examination of Matthew Hansen (Dkt. 91, pp. 25-26; Dkt. 186, pp. 6-7;
 5 Dkt. 187, pp. 14-15), the medical report of the examination of Kathryn Spencer (Dkt. 91, pp. 26-
 6 27; Dkt. 186, pp. 6-7; Dkt. 187, pp.14-15), and the report by King County Deputy Prosecutor
 7 Rebecca Roe (Dkt. 91, pp. 27-28; Dkt. 180, p. 32). The latter of these two Orders specifically
 8 prevents plaintiff from using the Roe report in support of his claim that Krause and Davidson
 9 conspired to conceal the Roe report "... for the purposes of framing and imprisoning Mr.
 10 Spencer or for any other purpose." Dkt. 180, p. 40, ll. 2-7.

12 Orders have also been entered dismissing all claims against defendants for an alleged
 13 failure to disclose James Peters' videotaped interview of Kathryn Spencer. Dkt. 186, pp. 3-6;
 14 Dkt. 187, pp. 14-15. Although the Orders entered dismissing all claims for failure to disclose
 15 the medical reports and the Peters interview videotape did not include the same language barring
 16 their use to prove a conspiracy, the same rationale applies and warrants entry of the requested
 17 order in limine on these subjects. Evidence of failure to disclose medical reports or the Peters
 18 interview videotape is not sufficiently probative of an alleged conspiracy to deliberately lie
 19 about what the children disclosed to be relevant under FRE 401. Even if deemed relevant, the
 20 probative value of this evidence is substantially outweighed by the danger of confusing the
 21 issues, misleading the jury as to the basis for liability, and wasting time at trial. These points are
 22 all especially applicable to the report of the examination of Matt Hansen, since it is undisputed
 23 that the Sheriff's Office never received a copy of that report. Dkt. 63-16, p. 4, ll. 2-4.

26 Finally, in addition to seeking an order in limine precluding introduction of the

1 inadmissible and hearsay medical reports regarding examinations of Kathryn Spencer and
 2 Matthew Hansen, defendants seek to preclude introduction of the following related material: (1)
 3 two investigative file indices which plaintiff included in his pretrial statement as plaintiff's
 4 Exhibits 17 and 28; (2) Utility Reports referencing the medical report regarding Kathryn and a
 5 release for the medical report which are included as plaintiff's Exhibit 22 and 20, respectively;
 6 and (3) a letter and an interoffice memo by former elected Clark County Prosecutor Arthur
 7 Curtis referencing a later search for Kathryn's medical report among the Prosecutor's Office
 8 files, which are included as plaintiff's Exhibits 78 and 79, respectively. Exclusion of the
 9 hearsay medical report of Kathryn's examination would render these closely related and
 10 dependent exhibits irrelevant and inadmissible under FRE 401 and 403 as well.

12 **b. Alleged coercive interview techniques**

13 Plaintiff's pretrial statement includes as proposed exhibits all of the Utility Reports
 14 written by defendant Krause regarding her interviews of the three child victims. Although
 15 defendants stipulate to the admissibility of those reports, defendants anticipate plaintiff will
 16 again attempt to elicit testimony or make arguments raising questions about the techniques used
 17 in those interviews, or alleged coercion of the children to disclose plaintiff's sexual abuse.
 18 Defendants also anticipate plaintiff, Kathryn Tetz and Matthew Spencer will continue to testify,
 19 as they did in their depositions, that the children's disclosures of plaintiff's sexual abuse were
 20 the product of allegedly coercive interview techniques, which was the centerpiece of their
 21 liability theory against defendants until this Court rejected that claim.

22 This Court entered orders dismissing all claims against defendants Davidson and Krause
 23 based on alleged use of improper or coercive interview techniques. Dkt. 180, pp. 21-11; Dkt.
 24 187, p. 11. As with the Roe report, the Order dismissing plaintiff's claim of allegedly coercive

1 interview techniques specifically prevents plaintiff from utilizing evidence of allegedly coercive
 2 interview techniques in support of his conspiracy claim. *See* Dkt. 180, p. 40, ll. 2-7. This ruling
 3 should be honored at trial.

4 **c. Handwritten notes of Matt Hansen interview**

5 Plaintiff's pretrial statement lists handwritten notes purporting to document some
 6 unidentified person's interview of Matt Hansen when he was an adult. *See* plaintiff's proposed
 7 Ex. 95. The Court has twice ruled these unauthenticated handwritten notes "are inadmissible
 8 hearsay" and struck them from the record. Dkt. 174, p. 24 n. 3 and Dkt. 180, p. 30 n. 3. Even if
 9 they could be properly authenticated, the notes are still inadmissible hearsay, as they purport to
 10 contain assertions made by non-party Matt Hansen which would be offered to prove the truth of
 11 the matters asserted, and they were not made under penalty of perjury at a trial, hearing or other
 12 proceeding, or in a deposition. *See* FRE 801(a), (b), (c) and (d)(1)(A).

14 **d. Alleged jail visits by defendant Davidson to coerce plaintiff to**
 15 **plead guilty**

16 Defendants anticipate plaintiff will again attempt to introduce evidence or argument that
 17 defendant Davidson allegedly visited plaintiff in jail on several occasions to coerce plaintiff to
 18 plead guilty. An Order was entered preventing relitigation of this claim that Davidson
 19 unconstitutionally coerced plaintiff into pleading guilty by making allegedly unwanted visits to
 20 plaintiff while he was in jail. Dkt. 91, pp. 24-25. This order should be honored at trial.

22 **e. Plaintiff's alleged incompetence when he pled and was sentenced**

23 Defendants anticipate plaintiff will again attempt to introduce evidence or argument that
 24 he was mentally incompetent and unable to understand the charges and evidence against him at
 25 the time he pled guilty and was sentenced. Plaintiff is collaterally estopped from attempting to
 26 relitigate this issue, as both state and federal courts previously held that he was competent at the

1 time of entry of his guilty plea and sentencing, following full and fair litigation of the issue by
 2 plaintiff. Dkt. 63-10, pp. 2-4 and Dkt. 63-16, p. 5. *See Trevino v. Gates*, 99 F.3d 911, 923 (9th
 3 Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997). Plaintiff should not be permitted to offer
 4 evidence or argument that he was of unsound mind when he pled guilty and was sentenced for
 5 sexually abusing all three children.

6
 7 **2. Any copies of former Governor Locke's December 23, 2004 Conditional**
 8 **Commutation, or court orders or decisions in any of plaintiff's post-**
 9 **conviction judicial proceedings, and any testimony or argument regarding**
 10 **statements in any of these documents related to alleged "irregularities" in**
 11 **the underlying criminal investigation should be excluded.**

12 Plaintiff has indicated in his pretrial statement that he intends to offer evidence and
 13 argument regarding the conditional commutation of his prison sentence and subsequent
 14 appellate court rulings referencing that document. *See* plaintiff's Ex. 83 (Conditional
 15 Commutation) and Exs. 91-94 (court decisions and orders). In the Conditional Commutation of
 16 the remainder of plaintiff's prison sentence, former Governor Locke noted "a number of
 17 troubling aspects of the investigation." However, these statements supporting the Conditional
 18 Commutation were not findings made after any litigation or adversarial proceeding concerning
 19 the alleged "troubling aspects," which are now squarely at issue in this case. *See* Dkt. 63-18.

20 This list of "troubling aspects" then became a list of "numerous irregularities" in the
 21 Court of Appeals' Order Transferring Petition for a Reference Hearing (Dkt. 63-20, pp. 12-15),
 22 which cited no evidence to support the list other than Gov. Locke's Conditional Commutation
 23 in the statement of "Facts." Dkt. 63-20, p. 5. When the State requested clarification of the
 24 scope and content of the reference hearing and asked for permission to introduce evidence
 25 regarding the "irregularities," the Court of Appeals refused to allow litigation of these issues,
 26 ordering as follows: **"5. No, the State may not attempt to explore or explain any 'alleged**

1 **irregularities’ that occurred in the underlying investigation and plea proceedings.”** Dkt.
 2 63-21 (emphasis added) (*see also* points 2 and 3 in that Order, where the Court of Appeals says
 3 “No. The State may not use the reference hearing to dispute the content of our reference order,”
 4 and “No. The State may not call additional witnesses or experts, nor may it offer documentation
 5 from other courts.”). Point 4 of the order made clear that the only issue to be determined at the
 6 reference hearing was whether the recanting witnesses would testify under oath consistently
 7 with their sworn statements, and concludes by stating “[o]ur order does not request additional
 8 fact finding on other issues.”

10 None of the language in the Governor’s commutation letter, or the dicta contained in
 11 opinions by the Court of Appeals and Washington Supreme Court regarding alleged “troubling
 12 aspects” or “irregularities” in the investigation or misconduct by any of the defendants in this
 13 case has any relevance to the remaining issues now being litigated before this Court, and all
 14 such orders and decisions should be excluded. In fact, this Court has determined that Davidson
 15 and Krause are not liable for most of the alleged “troubling aspects” or “irregularities”
 16 referenced in that material.

18 Additionally, the Conditional Commutation and subsequent dicta in appellate court
 19 rulings should be excluded pursuant to FRE 403 because they supplant this Court’s role to
 20 instruct the jury on applicable law, are unfairly prejudicial, confuse the issues, and mislead the
 21 jury that the alleged “irregularities” must be accepted by the jury as undisputed facts previously
 22 resolved by prior litigation. The potential for unfair prejudice arises from the danger that jurors
 23 would be overly impressed with the aura connected to statements made by former Governor
 24 Locke or the courts, even though those statements are dicta, and not the product of an
 25 evidentiary hearing. Plaintiff’s intention to exploit this prejudice has already been made
 26

1 apparent. *See, e.g.*, Dkt. 140-1, p. 3, ll. 24-26 (plaintiff asks in an interrogatory “Do you agree
2 with the Washington Supreme Court that Michael Davidson’s personal relationship with Shirley
3 Spencer began during the investigation of Ray Spencer?”).

4 To clarify, defendants do not seek to preclude plaintiff or his witnesses from testifying
5 to the fact that the Conditional Commutation was issued releasing him from prison, that the
6 post-conviction judicial proceedings occurred, or that the outcome of those post-conviction
7 proceedings resulted in his guilty plea being vacated and the Clark County Prosecuting attorney
8 deciding to voluntarily dismiss the charges against him without prejudice. Such facts may be
9 relevant to explain the procedural history of the case, as well as how and when plaintiff
10 eventually gained his release and permission to withdraw his guilty plea. Defendants admit to
11 the above summarized facts in their joint pretrial statement, so this evidence can be before the
12 jury without the necessity of admitting the objectionable commutation letter and subsequent
13 dicta from the appellate courts adopting the same. Defendants seek an order in limine
14 precluding introduction of any of these documents as exhibits, and precluding testimony or
15 argument pointing to dicta in these appellate decisions or the Conditional Commutation
16 describing alleged “troubling aspects” or “irregularities” during the investigation.

17 If plaintiff is permitted to offer selected court opinions and/or the Governor’s
18 commutation letter, then in fairness defendants should be permitted to offer all of the other court
19 rulings over the years that rejected his numerous appeals of his conviction. Defendants
20 conditionally identified and offered those other court rulings as trial exhibits in defendants’
21 pretrial statement in the event the Court overrules defendants’ objections to plaintiff’s selective
22 use of only those rulings he believes are favorable. Defendants’ position is that FRE 401 and
23 403 preclude admission of Governor Locke’s commutation letter, and all post-conviction court
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1 rulings, including those conditionally offered by defendants. But, if the Court disagrees,
 2 fairness would require that all the court rulings should be admitted, many of which reach
 3 opposite results from the dicta plaintiff seeks to offer.

4 **3. Any copies of, or testimony or argument regarding, an allegedly forged**
 5 **retirement check or quit claim deed should be excluded.**

6 Plaintiff has indicated in his pretrial statement that he intends to offer evidence and
 7 argument that some unidentified person allegedly forged his name to a retirement check and to a
 8 quit claim deed for a house he co-owned with Shirley Spencer. *See, e.g.*, plaintiff's proposed
 9 Exs. 47 and 61. This evidence and argument should be excluded for two independent reasons:
 10 (1) the alleged forgeries are immaterial to his remaining claims of deliberate fabrication of
 11 evidence and conspiracy to frame him for crimes he did not commit; and/or (2) a jury would be
 12 required to engage in improper speculation to connect defendants Davidson or Krause to these
 13 alleged forgeries.
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15 Even if plaintiff were able to prove either or both of his signatures were forged, evidence
 16 that his signatures on the check and the deed were forged has no tendency to prove defendants
 17 deliberately misquoted the children's statements describing plaintiff's sexual abuse despite
 18 defendants alleged knowledge that plaintiff was innocent, or that defendants conspired to
 19 deliberately misquote the children's statements to frame him for crimes they knew he did not
 20 commit. Thus, evidence and argument of these alleged forgeries should be excluded as
 21 irrelevant under FRE 401.
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23 Even if deemed relevant, this evidence and argument should be excluded under FRE 403
 24 because it confuses the issues the jury is to decide, and results in wasting the jury's time on a
 25 mini-trial regarding an issue that is not probative of whether defendants deliberately misquoted
 26 children's statements or conspired to frame plaintiff for sexually abusing children. A mini-trial

1 on this issue would include calling plaintiff's former forensic psychologist, Dr. Kevin
 2 McGovern, and offering defendants' Exhibit A-6, which are Dr. McGovern's notes of plaintiff's
 3 meeting with him on March, 27, 1985. In those notes, Dr. McGovern writes that plaintiff told
 4 him as follows: "Hasn't seen wife for 4-5 weeks – **he's signed house over to her** – she never
 5 comes in. He hopes they aren't getting divorced. He's been in jail 3-4 weeks." [Emphasis
 6 added].
 7

8 Defendants are not on trial for an alleged conspiracy to aid or abet an alleged theft from
 9 plaintiff by Shirley Spencer. Plaintiff's claim that Shirley Spencer was a party to an alleged
 10 conspiracy was dismissed on several grounds, one of which was lack of evidence. Dkt. 91, pp.
 11 44-45, and specifically *id.*, p. 45, ll. 9-11. Permitting plaintiff to present evidence or argument
 12 about these alleged forgeries as evidence of a conspiracy to financially benefit Shirley Spencer
 13 should be precluded pursuant to FRE 403, as well as FRE 401. This same rationale was applied
 14 by the Court in the Order on Davidson's renewed summary judgment motion, in which the
 15 Court noted the lack of evidence of former defendant James Peters' involvement in the alleged
 16 conspiracy to frame plaintiff and ruled as follows: "Spencer also argues that Davidson
 17 conspired with Peters to imprison Mr. Spencer. *See, e.g.*, Dkt. 165 at 10 and 22. However, the
 18 Court has already determined that Peters played no role in the alleged conspiracy. *See* Dkt. 174
 19 at 35-36. Therefore, the Court addresses only Mr. Spencer's claim that Davidson conspired with
 20 Krause, not Peters, to imprison Mr. Spencer." Just as evidence of an alleged conspiracy
 21 involving Peters should be excluded, so should evidence of an alleged conspiracy involving
 22 Shirley Spencer.
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 24

25 Additionally, there is no evidence or reasonable inference connecting either Davidson or
 26 Krause to the alleged forgeries, meaning the jury would have to improperly speculate to make

1 such a connection. There is no evidence or logical inference that either Davidson or Krause had
 2 access to Spencer's retirement check from the Vancouver Police Department, or any opportunity
 3 to forge his signature on that check. Assuming a forgery occurred, it is at least equally probable
 4 Shirley Spencer or someone else with a financial interest, who also had access to the check and
 5 motive and opportunity to commit forgery, forged the check without any knowledge or
 6 involvement of Davidson or Krause. "The jury is not permitted to speculate in choosing one of
 7 alternative possibilities, but is restricted to reasonable inferences based upon facts." *Wolf v.*
 8 *Reynolds Elec. & Engineering Co.*, 304 F.2d 646, 650 (9th Cir. 1962). "[M]ere suspicion and
 9 speculation cannot be the basis for logical inferences." *U.S. v. Lindsey*, 634 F.3d 541, 552 (9th
 10 Cir.), *cert. denied*, 131 S.Ct. 2475 (2011). There are many alternative possibilities concerning
 11 who allegedly forged plaintiff's retirement check, but claiming it was Davidson and/or Krause is
 12 based on mere suspicion and speculation. Therefore, evidence or argument regarding this
 13 allegedly forged check should be excluded.

14
 15 Although plaintiff alleged in July 1985 that his signature on the retirement check was
 16 forged, he did not claim his signature on the deed was forged until December 2012. Dkt. 146, p.
 17 33, ll. 10-15. The only evidence regarding defendants and the deed is that Davidson allegedly
 18 asked plaintiff to sign it at Shirley Spencer's request, plaintiff refused, and Davidson
 19 immediately returned the deed to Shirley unsigned. Dkt. 138-2, p. 13 (dep. p. 114, ll. 14-16).
 20 This meager evidence is insufficient to allow a jury to infer that Shirley then asked Davidson
 21 and/or Krause to illegally forge plaintiff's signature, they agreed to do so, they then stole
 22 Menona Landrum's notary seal, illegally forged her signature, and returned the forged deed to
 23 Shirley so she could later sell the house for \$5,000. *See id.* at p. 30 (dep. p. 140). As with the
 24 retirement check, there are many alternative possibilities concerning who would allegedly forge

1 the deed, such as Shirley Spencer acting independently. The jury should not be permitted to
 2 make such huge, speculative leaps that have no bearing on the real issues remaining in this case.
 3 Thus, evidence or argument regarding the allegedly forged deed also should be excluded.

4 **4. Any copies of, or testimony or argument regarding, deeds related to the**
 5 **property at 18308 N.E. Cole Witter Road should be excluded.**

6 Plaintiff has indicated in his pretrial statement that he intends to offer evidence and
 7 argument about Shirley Spencer's purchase of a house on Cole Witter Road after she sold the
 8 house she and plaintiff had co-owned. *See, e.g.*, plaintiff's proposed Ex. 51. Shirley Spencer's
 9 later purchase of a house is immaterial to plaintiff's remaining claims that Davidson and Krause
 10 deliberately fabricated evidence and conspired to frame him for crimes he did not commit.
 11 Again, plaintiff's claim that Shirley Spencer was a party to an alleged conspiracy was dismissed.
 12 Dkt. 91, pp. 44-45. Permitting plaintiff to present evidence or argument about Shirley's later
 13 purchase of another house would, at best, only be probative of an alleged conspiracy involving
 14 Shirley Spencer, which should be precluded pursuant to FRE 401, as well as FRE 403.

16 **5. Any copy of the written report or CV of David Raskin, Ph.D., any opinions**
 17 **or other testimony by Dr. Raskin beyond the subject matter of the two**
 18 **polygraph examinations administered to plaintiff by Dr. Stanley Abrams,**
 19 **and any opinions or testimony by Dr. Raskin about the truthfulness or**
 20 **accuracy of defendant Krause's report of being told by Dr. Abrams that**
 21 **plaintiff scored a "minus thirteen" should be excluded.**

22 Plaintiff has indicated in his pretrial statement that he intends to offer as exhibits his
 23 expert David Raskin's forensic report and resume, in addition to calling Mr. Raskin as a witness.
 24 *See* plaintiff's proposed Exs. 97 and 104. He also states that Mr. Raskin will offer an opinion
 25 that defendant Krause falsely reported that Dr. Abrams' score for one of plaintiff's polygraph
 26 examinations was a "minus thirteen." These two proposed exhibits and Mr. Raskin's opinion
 about whether Krause falsely reported the polygraph score should be excluded.

Mr. Raskin's forensic report and resume should be excluded under FRE 403 as needless

1 presentation of cumulative evidence assuming Mr. Raskin is called to testify, as plaintiff
 2 indicates he will be. The relevant contents of his resume will necessarily be testified to as a
 3 prerequisite to qualifying him as an expert in polygraphy under FRE 702. He also will
 4 necessarily testify about the relevant contents of his forensic report criticizing Dr. Abrams'
 5 polygraph examinations of plaintiff. Exhibits containing this expected testimony are thus
 6 cumulative and should be excluded pursuant to FRE 403. If plaintiff does not call Mr. Raskin as
 7 a witness, these two exhibits should be excluded as hearsay pursuant to FRE 801 and 802.

9 In addition, plaintiff's pretrial statement indicates that Mr. Raskin will testify to "... his
 10 conclusion that Defendant Krause's representation that Plaintiff scored a 'minus thirteen' is
 11 contrary to Dr. Abrams' report." Actually, the portion of defendant Krause's report which refers
 12 to the "minus thirteen" polygraph score makes clear that Krause was reporting that Dr. Abrams
 13 told her the score was a "minus thirteen." Her report states as follows: "After Dr. ABRAMS
 14 conducted the examination he made contact with Sgt. DAVIDSON and me and advised that the
 15 results of the polygraph examination were indicative of deception, mentioning that the score was
 16 a 'minus thirteen.'" Dkt. 168-1, pp. 47-48. Mr. Raskin was not present when Dr. Abrams talked
 17 to defendants about the polygraph examination, and he has no basis as a fact or expert witness to
 18 testify about what Dr. Abrams said at that time.¹

20 The misuse plaintiff intends to make of Mr. Raskin's proffered testimony on this subject
 21 was stated in plaintiff's prior briefing as follows: "Plaintiff's expert, Dr. Raskin, has testified
 22 Krause's report is false because minus 13 would be "a clear, conclusive, deceptive result" and
 23 that is inconsistent with the Abrams' (sic) report. ... The polygraph result does not add to
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25
 26 ¹ Dr. Abrams died years ago and cannot testify about how he scored plaintiff on the 1984 polygraph tests, or what he told defendants about the scores.

1 probable cause. Rather, the circumstances surrounding the test demonstrate Krause's
 2 willingness to fabricate evidence in a malicious effort to frame Ray." Dkt. 166, p. 11, ll. 16-21
 3 (emphasis in original). Plaintiff should be precluded from misusing inadmissible testimony in
 4 this manner. An expert's opinion regarding a party's credibility usurps the jury's role as the
 5 ultimate fact finder on credibility and thus does not assist the jury as required by FRE 702. *U.S.*
 6 *v. Finley*, 301 F.3d 1000, 1009 (9th Cir. 2002). Although FRE 608(a) permits testimony
 7 regarding a witness's general character or reputation for truthfulness or untruthfulness,
 8 testimony regarding a witness's truthfulness on a particular occasion is ordinarily prohibited.
 9 *U.S. v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999) (discussed in *Finley*); FRE 608(b).
 10 Accordingly, Mr. Raskin should be prohibited from expressing opinions or conclusions about
 11 the truth of what Krause reported Dr. Abrams had told her, or essentially opining that Krause
 12 lied when reporting the polygraph score Dr. Abrams had told her, in order to create an improper
 13 inference and support an unfounded argument that the jury should also conclude she lied about
 14 other matters in her police reports.
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16
 17 **6. Any copy of, or testimony or argument regarding, the videotape of the**
 18 **interview of Kathryn Spencer by James Peters, or any transcript of that**
 19 **videotaped interview should be excluded.**

20 Plaintiff has indicated in his pretrial statement that he intends to offer as exhibits the
 21 videotape of James Peters' interview of Kathryn Spencer, a transcript of that videotaped
 22 interview, another copy of the videotape captioned with the text of the transcript of that
 23 interview, and Krause's affidavit of authenticity regarding the videotape. *See* plaintiff's
 24 proposed Exs. 29, 30, 102, and 123. The videotape and transcripts of the same should be
 25 excluded under FRE 410 and 403 based on this Court's prior rulings because, as discussed
 26 above, plaintiff should be barred from offering evidence or argument that: (1) the children's

1 disclosures of plaintiff's sexual abuse were the product of coercive or improper interview
 2 techniques (in this instance, interview techniques used by James Peters, who has been dismissed
 3 as a defendant); and (2) the videotape was *Brady* material that should have been disclosed to
 4 plaintiff's criminal defense attorney before he pled guilty. Krause's affidavit authenticating the
 5 videotape should be excluded for the same reasons. Additionally, offering the transcript of the
 6 interview, the videotape of the interview, and the combined transcript and videotape of the
 7 interview would be cumulative, and thus prohibited by FRE 403.

9 If any of these three cumulative exhibits is admitted over defendant's objections, it
 10 should only be the videotape (plaintiff's Ex. 30). Defendants object to admission of the
 11 transcriptions (plaintiffs' Exs. 29 and 123) of the videotape, which had relatively poor sound
 12 quality at times and as a result was not always accurately transcribed. For example, in one
 13 section, the transcript created by someone hired by plaintiff states Deanne Spencer told Kathryn
 14 Spencer "Let's get Ray one more time." Defendants believe this is an incorrect transcription of
 15 what was actually said. In other sections, alleged gestures and non-verbal communications are
 16 transcribed as interpreted by the transcriber. Neither defendants, nor the three individuals
 17 appearing on the videotape had an opportunity to make corrections to their unsworn statements,
 18 as would be permitted if it was a transcript of a deposition (*see* FRCP 30(e)). Rather than
 19 misleading or confusing jurors with an inaccurate transcript, if the jury is to be permitted to
 20 consider Peters' videotape interview to determine the remaining claims against Davidson and
 21 Krause, the jurors should be allowed to decide for themselves what was said or done on the
 22 videotape, not told via an inaccurate transcript what plaintiff believes was said or done.

23 //

1 **7. Any copies of, or testimony or argument regarding, records related to the**
 2 **prosecution's production of evidence to defense counsel in the underlying**
 3 **criminal case should be excluded.**

4 Plaintiff's Exhibit 35 in his pretrial statement is a copy of an Omnibus Application by
 5 Defendant and Order of Court entered during the underlying criminal case pursuant to which the
 6 prosecutor was obligated to provide certain evidence and materials during pretrial discovery. As
 7 set forth in section II.B.1.a. above, this Court has entered orders dismissing all claims against
 8 defendants for alleged failures to disclose evidence during plaintiff's criminal trial. Plaintiff's
 9 claims against the Clark County Prosecutor's Office and former prosecutor James Peters for
 10 alleged withholding of Brady material and other alleged constitutional violations have been
 11 dismissed. Dkt. 97, 98, 174, and 179. Consequently, Exhibit 35 should be excluded pursuant to
 12 FRE 401 and 403, and no testimony or argument allowed regarding it or any other pleadings or
 13 orders in the criminal case that pertain to the disclosure or production of evidence by the
 14 prosecutor, or other previously dismissed claims against the prosecutor's office or James Peters.

15 **8. Any copies of, or testimony or argument regarding, pleadings or other**
 16 **records from the dissolution proceedings between Ray and Shirley Spencer,**
 17 **and Michael and Linda Davidson, beyond the Petitions, Answers and/or**
 18 **Counter Petitions, and Replies, should be excluded.**

19 Plaintiff has indicated in his pretrial statement that he intends to offer as exhibits Shirley
 20 Spencer's divorce petition (plaintiff's Ex. 57), plaintiff's answer to that petition (plaintiff's Ex.
 21 62), Davidson's divorce petition (plaintiff's Ex. 63), Linda Davidson's answer to that petition
 22 and counter-petition (plaintiff's Ex. 64), and Davidson's reply to the counter-petition (plaintiff's
 23 Ex. 66). Recognizing these documents are of marginal relevance to the remaining claims the
 24 jury is to decide (*e.g.*, the timing of when these two marriages ended), defendants have not
 25 objected to the admissibility of these documents.

26 However, plaintiff indicates he also intends to offer 13 additional documents pertaining

1 to these two divorce proceedings, including motions for restraining orders regarding transfers of
 2 property in both cases, and findings of fact and conclusions of law regarding the dissolutions.
 3 *See* plaintiff's proposed Exs. 58, 59, 60, 65, 67-76. These additional dissolution records are
 4 immaterial to plaintiff's remaining claims of deliberate fabrication of children's quotations in
 5 police reports and conspiracy to frame plaintiff for crimes he did not commit. The ultimate
 6 distribution of property following the Spencers' and the Davidsons' respective divorces has
 7 nothing to do with the remaining issues in this case. Additionally, they should be excluded under
 8 FRE 403 on the grounds they confuse the issues, cause undue delay and waste time, and because
 9 the additional material regarding the Davidsons' divorce contain inadmissible hearsay.
 10

11 **9. Any copies of video from, or testimony or argument regarding, the ABC**
 12 **News 20/20 "Kids Recant" program should be excluded.**

13 Plaintiff has indicated in his pretrial statement that he intends to offer 66 exhibits from
 14 the ABC News 20/20 program entitled "Kids Recant." *See* plaintiff's Exs. 130-195. Some of
 15 plaintiff's witnesses, including plaintiff, Kathryn Spencer, Matt Spencer and Menona Landrum,
 16 made references to this program during their deposition testimony, and Ms. Landrum
 17 specifically relied on the program as a basis for speculating that defendants may have forged
 18 plaintiff's signature on a deed because they allegedly conspired to frame plaintiff for crimes he
 19 did not commit according to the biased, one-sided account portrayed in the 20/20 program. Any
 20 copies of the video from this program, or testimony or argument referencing the program,
 21 should be excluded under FRE 403 as unduly prejudicial and misleading. The fact that plaintiff
 22 managed to garner national media attention about his situation is unfairly prejudicial in itself as
 23 it would lend an aura of credibility to his allegations in the minds of media-conscious jurors.
 24 The program, or excerpts from it, also is inadmissible hearsay under FRE 801 and FRE 802 that
 25
 26

1 is offered to prove a conspiracy existed and that defendants deliberately fabricated evidence; the
 2 very issues the jury is to decide.

3 **10. Any copies of, or testimony or argument regarding, any newspaper articles**
 4 **or correspondence related to newspaper articles discussing any aspect of the**
 5 **underlying criminal case should be excluded.**

6 Plaintiff has indicated in his pretrial statement that he intends to offer two newspaper
 7 articles (plaintiff's Exs. 84 and 85), James Peters' written response to those articles (plaintiff's
 8 Ex. 87), defendant Davidson's written responses to those articles (plaintiff's Exs. 86 and 89),
 9 and a press release from the Clark County Prosecuting Attorney's office (plaintiff's Ex. 103).
 10 Presumably, plaintiff also intends to adduce testimony regarding the two newspaper articles and
 11 the related letters to newspapers to lay a foundation for their admissibility. This evidence should
 12 be excluded because it is hearsay, unfairly prejudicial and would mislead the jury.

13 The content of newspaper articles is routinely held to be inadmissible hearsay. *E.g.*,
 14 *Larez v. City of Los Angeles*, 946 F.2d 630, 642-43 (9th Cir. 1991) (citing authorities). Thus,
 15 plaintiff's Exs. 84 and 85 should be excluded. The responses to those articles written by James
 16 Peters and Davidson, referencing the content of the articles, are also inadmissible hearsay under
 17 FRE 801 and FRE 802, and their content is irrelevant to the issues left to be decided under FRE
 18 401. Admitting James Peters' and Davidson's written criticisms of that hearsay would
 19 essentially be a misleading, "back door" way to admit the hearsay reports they were criticizing
 20 as unfair and incomplete media reporting, warranting their exclusion under FRE 403. Thus,
 21 Peters' and Davidson's written responses to the newspaper articles should be excluded along
 22 with the newspaper articles themselves.
 23

24 The press release from the Clark County Prosecuting Attorney's Office should be
 25 excluded pursuant to FRE 401 and 403 and because it is hearsay. No exception to the hearsay
 26

rule applies to the press release. Moreover, this press release was the basis for plaintiff's defamation claim, which was previously dismissed by this Court. Dkt. 91, pp. 38-39; Dkt. 93, p. 27. As argued above, pursuant to FRE 401 and 403, plaintiff should not be permitted to offer evidence or argument about claims that were previously dismissed by this Court. The Prosecuting Attorney's press release is immaterial to the remaining claims against Davidson and Krause. Even if it were material, FRE 403 independently justifies exclusion because the press release confuses the issues the jury is to decide and misleads the jury into incorrectly believing Davidson or Krause had any connection to the press release, which was issued by a separate entity more than a decade after each had retired from the Clark County Sheriff's Office.

11. Any copies of records, or testimony or argument related to, plaintiff's post-conviction efforts to gain release from prison, with the exception of Matt Spencer's March 3, 2003 letter to former Governor Locke, should be excluded.

Plaintiff indicated in his pretrial statement that he intends to introduce into evidence copies of a letter James Peters wrote in 1998 to the Independent Sentencing Review Board (Exhibit 80), a letter DeAnne Spencer wrote to Governor Locke in 2003 (Exhibit 81), a letter Matt Spencer wrote to the Clemency and Pardons Board in 2006 (Exhibit 88), a letter defendant Davidson wrote to a representative of the Governor's office in 2006 (Exhibit 89), and a letter Arthur Curtis wrote to the Clemency and Pardons Board in 2007 (Exhibit 90). These letters express opinions of the authors about the wisdom of plaintiff being paroled from prison, or being granted clemency or a pardon, and are therefore irrelevant to the remaining issues under FRE 401. The 2006 letter by Matt Spencer also contains statements regarding allegedly coercive interview techniques used by defendant Krause, a claim which this Court has dismissed and ruled inadmissible for purposes of attempting to prove a conspiracy, or for any other purpose. Even if deemed relevant, these letters should be excluded under ER 403 as their

1 introduction into evidence would confuse the issues, mislead the jury concerning the issues they
2 are to decide, and waste time at trial.

3 The only other similar exhibit listed by plaintiff in his pretrial statement is a copy of Matt
4 Spencer's March 2, 2003 letter to Governor Locke in which he objects to plaintiff's request for
5 clemency. Defendants have stipulated to the admissibility of this letter due to its relevance to
6 Matt Spencer's later recantation of his disclosures of sexual abuse by plaintiff in March 2006.

7
8 **12. Any copy of a document listing, or testimony or argument related to, plaintiff's past or current medications should be excluded.**

9 Plaintiff's pretrial statement identifies his proposed Exhibit 105 as "Ray Spencer's
10 current list of prescription medications." This two page computer printout lists 11 prescription
11 medications under a heading "Active Outpatient Medications," and five others under a heading
12 "Inactive Outpatient Medications." The printout shows a date of 11/19/2013, but does not
13 identify the medical facility or health care provider from which it was obtained. After listing
14 these "16 Total Medications," the printout concludes: "***DRAFT COPY – DRAFT COPY –
15 ABOVE NOTE IS UNSIGNED—DRAFT COPY – DRAFT COPY**."

16
17 Exhibit 105 should be excluded for two reasons. First, it has not been authenticated, nor
18 has any witness been identified who could do so. Second, even if properly authenticated, expert
19 medical testimony would be required to render a diagnosis of each condition or symptom for
20 which each of the medications has been prescribed, and to establish a causal connection between
21 each such condition or symptom and the injuries or damages allegedly caused by defendants.
22 *See Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997) ("medical records and
23 bills are relevant to prove past medical expenses only if supported by additional evidence that
24 the treatment and the bills were both necessary and reasonable"); *James River Ins. v. Rapid*
25 *Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011) (FRE 701 "does not permit a lay witness to
26

1 express an opinion as to matters which are beyond the realm of common experience and which
 2 require the special skill and knowledge of an expert witness”); RCW 18.64.011(25) (defining
 3 “prescription” as “an order for drugs or devices issued by a practitioner duly authorized by law
 4 or rule in the state of Washington to prescribe drugs or devices in the course of his or her
 5 professional practice for a legitimate medical purpose”).

6
 7 When faced with the prospect of a court ordered independent mental health examination,
 8 plaintiff made the strategic decision to withdraw the only mental health expert he disclosed in
 9 this case, Dr. Ruth Kuncel. Dkt. 132, p. 3, ll. 7-8. Plaintiff himself is unable to provide the
 10 necessary testimony that would make plaintiff’s proposed Exhibit 105 admissible, as this Court
 11 has already ruled that he will be prohibited from providing any expert testimony in this case.
 12 Dkt. 132, p. 3, ll. 14-16. Accordingly, plaintiff’s Exhibit 105 should be precluded, as should any
 13 evidence or argument that plaintiff has been diagnosed with any mental or physical health
 14 conditions requiring reasonable and necessary medical treatment of any kind.
 15

16 **13. Any copies of, or testimony or argument regarding, criminal cases in which**
 17 **Matthew Hansen was a defendant that are not admissible under FRE 609**
 18 **should be excluded.**

19 Plaintiff has indicated in his pretrial statement that he intends to offer 16 exhibits
 20 regarding Matthew Hansen’s criminal history from 2002 to 2013. *See* plaintiff’s Exhibits 106-
 21 122. Evidence of prior crimes is generally inadmissible. FRE 404(b). However, evidence of
 22 specifically limited types of criminal convictions may be admissible only to impeach a witness’s
 23 character for truthfulness. FRE 609. Thus, these exhibits could potentially be admissible if
 24 Matthew Hansen testifies, but would not be admissible if he does not testify.

25 Defendants have indicated in their joint pretrial statement that they will call Matthew
 26 Hansen to testify. If he testifies, then he would be subject to proper impeachment. However,

1 plaintiff should be precluded from impeaching Matthew Hansen based on his proposed Exhibits
2 106-122 because these exhibits do not meet the requirements of FRE 609.

3 The only crimes admissible for impeachment purposes under FRE 609 are crimes
4 punishable by imprisonment for more than one year, or crimes where “the court can readily
5 determine that establishing the elements of the crime required proving – or the witness’s
6 admitting – a dishonest act or false statement.” FRE 609(a)(1) and (2). As a threshold matter,
7 only plaintiff’s proposed exhibits 107 (plea of guilty), 110 (judgment and sentence) and 117
8 (judgment and sentence) are evidence of convictions. The remaining 13 exhibits pertaining to
9 Matthew Hansen’s court involvement should be excluded because they do not provide evidence
10 of convictions and are thus outside the scope of permissible impeachment authorized by FRE
11 609.
12

13 Turning to Exhibits 107, 110 and 117, the first two of these exhibits involve the same
14 conviction for criminal trespass in the first degree, which is a gross misdemeanor under RCW
15 9A.52.070. Exhibit 117 involves a conviction for assault in the fourth degree, which also is a
16 gross misdemeanor under RCW 9A. 36.041. Pursuant to RCW 9.92.020, the maximum sentence
17 for gross misdemeanors is not more than 1 year in jail. The elements for both of these crimes do
18 not require proof of a dishonest act or false statement. *See* RCW 9A.36.041; RCW 9A.52.070.
19 Therefore, none of plaintiff’s proposed Exhibits 106-122 should be admitted because none of
20 these exhibits involve crimes within the scope of FRE 609. Plaintiff should be precluded from
21 attempting to impeach Matthew Hansen based on these prior gross misdemeanor convictions.
22

23
24 **14. Cumulative photos of plaintiff and/or his family, and a prison setting should**
25 **be excluded.**

26 Plaintiff’s pretrial statement lists as exhibits two photos of plaintiff (Exhibits 1 and 2),
one photo of plaintiff with his children (Exhibit 3), and 66 photos described as “Still photo taken

1 from 20/20 ‘Kids Recant’ video” (Exhibits 130-195), which are a random collection of photos of
 2 plaintiff and/or his children, and/or his current wife, or depictions of penal institutions. None of
 3 these photos are relevant under FRE 401, as none tend to prove whether defendants deliberately
 4 lied about statements attributed to the children in defendant Krause’s reports, whether
 5 defendants did so with actual or constructive knowledge of plaintiff’s innocence, or whether
 6 defendants entered into a conspiracy to engage in such unconstitutional conduct. None of the
 7 photos of plaintiff with his children are accompanied by an identification of when they were
 8 taken and, even if taken during or after the reported abuse occurred, they would prove nothing of
 9 consequence because even an abused child can find moments to smile. Even if deemed to have
 10 some probative value, this cumulative selection of photos should be excluded under FRE 403
 11 because any such probative value is substantially outweighed by the danger of unfair prejudice
 12 to defendants caused by the photos’ appeal to sympathy for plaintiff by the jury. Introduction of
 13 these photos, especially all of them, would also result in undue delay, wasting time, and the
 14 needless presentation of cumulative evidence.
 15

16
 17 **15. Any argument, testimony, or comments which invite the jurors to conceptually**
 18 **put themselves in the place of the plaintiff in considering any of the issues**
 19 **should be excluded.**

20 This argument, commonly known as the “golden rule argument,” was expressly disfavored
 in *Meabon v. State*, 1 Wn. App. 824, 831, 463 P.2d 789 (1970), where the court stated:

21 Defendant’s last assignment of error relates to final argument of plaintiff’s counsel wherein
 22 he asked the jurors to place themselves in the position of Miss Meabon and experience
 23 some of the problems she would encounter because of her injury. This is a highly
 24 questionable request. A juror’s duty is to act disinterestedly and impartially. WPI 1.01.
 Counsel asked them to do otherwise.

25 As the *Meabon* court noted, jurors are uniformly instructed about their duty to be impartial
 26 and to not let sympathy or prejudice influence their determination in rendering a proper verdict.
See, e.g., 9th Cir. Manual of Model Civil Jury Instructions 1.1. Argument or testimony suggesting

1 particular empathy toward plaintiff is inconsistent with the duty of each prospective juror and the
2 jury as a whole.

3 In *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 139, 750 P.2d 1257, 756 P.2d 142 (1988), the
4 court similarly addressed the impropriety of a “golden rule” argument as follows:

5 Such an argument is “improper because it encourages the jury to depart from neutrality and
6 to decide the case on the basis of personal interest and bias rather than on the evidence.”

7 Accordingly, this type of argument or testimony is improper and should be prohibited.

8 RESPECTFULLY SUBMITTED this 2nd day of December, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, I caused to be electronically filed Defendants' Joint Motion in Limine with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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